No. 91-600

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

AUSTIN L. EVANS,
Petitioner,

vs.

HENRY J. GOODMAN, in his Official Capacities, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Sixth Circuit rule that the plaintiff in a reverse discrimination employment case "must submit proof of background circumstances which support the suspicion that 'the defendant is that unusual employer who discriminates against the majority,'" consistent with the rule in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n. 8 (1976), that the plaintiff in a reverse discrimination employment case is not required to prove across-the-board discrimination by the employer in favor of minorities?

2. Did the Sixth Circuit err in promulgating a rule of law that allegations of racial discrimination violative of the Fourteenth Amendment

Equal Protection Clause in public university faculty promotion and tenure decisions are not justiciable unless such discrimination can be established by intradepartmental comparisons?

3. Is the Sixth Circuit rule that a Fourteenth Amendment Equal Protection Clause claim, in the context of public university faculty promotion and tenure decisions, requires a class basis consistent with decisions of this Court?

LIST OF PARTIES

The petitioner is Austin L. Evans, whose name appears in the caption.

Although "Cleveland State University, Board of Trustees" was included in the caption assigned by the Sixth Circuit Court of Appeals, the Board of Trustees of Cleveland State University was voluntarily dismissed from the appeal that was pending before the Sixth Circuit, and Cleveland State University was never a party in this litigation.

The following respondents (or their successors) are defendants in their official Cleveland State University capacities with regard to petitioner's claims for prospective declaratory and injunctive relief: Henry J. Goodman as

Chair of the Board of Trustees and as Trustee; Annette G. Butler as Vice Chair of the Board of Trustees and as Trustee; Gerald H. Gordon as Treasurer of the Board of Trustees and as Trustee; Edward F. Bell as Trustee; Walter A. Burks, Jr. as Trustee; Darlene M. Levandosky as Trustee; Ruth R. Miller as Trustee; Diann G. Scaravilli as Trustee; Lyman H. Treadway as Trustee; John A. Flower as President; and Barbara B. Green as Interim Vice President for Academic Affairs.

The following respondents are defendants in their individual capacities: Henry J. Goodman; Annette G. Butler; Gerald H. Gordon; Edward F. Bell; Walter A. Burks, Jr.; Darlene M. Levandosky; Ruth R. Miller; Diann G. Scaravilli; Lyman H. Treadway; John A.

Flower; Barbara B. Green; Walter B. Waetjen; James H. Burghart; Robert F. Hartley; Frank A. Johns; Dennis Keating; Sidney Kraus; Thomas Lewis; Nicholas Moutafakis; Anthony P. Ponter; A. Raouf Arafa; Victor L. Streib; Carl Camden; Harold E. Dailey; Gary D. Engle; Kenneth M. Hoff; and Carol Takacs.

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Petitioner, Austin L. Evans, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in the above-entitled case.

REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed June 3, 1991, is unreported and is set forth in the Appendix hereto at pages A1-A23. The Order of the Sixth Circuit Court of Appeals, filed July 12, 1991, denying petitioner's petition for rehearing and suggestion for hearing en banc is unreported and is set forth in the Appendix hereto at pages A66-A67. The Memorandum of Opinion and the Order of the United States District Court for the Northern District of Ohio, filed

July 26, 1990, are unreported and are set forth in the Appendix hereto at pages A24-A63 and A64-A65, respectively.

JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit, filed June 3, 1991. The Sixth Circuit Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc in an Order filed July 12, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deny to any

person within its jurisdiction the equal protection of the laws."

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner filed this action in the United States District Court for the Northern District of Ohio, alleging, inter alia, racial and nonclass discrimination in violation of the

Fourteenth Amendment Equal Protection Clause and 42 U.S.C. Section 1983. (The District Court subsequently granted petitioner's motion to dismiss the other claims.) Jurisdiction was invoked pursuant to 28 U.S.C. Sections 1331 and 1343. The District Court granted the respondents' motion for summary judgment, and the Sixth Circuit Court of Appeals affirmed the District Court's judgment. All factual statements in the within petition are based on admissible evidence in the affidavits, declarations, and depositions properly filed in the District Court in the summary judgment proceeding.

Petitioner, a white male, was an Assistant Professor in the Fenn College of Engineering at Cleveland State University, a public university

organized and existing under the laws of the State of Ohio. This lawsuit arises from the denial, in 1988, of petitioner's 1987-88 application for promotion to the rank of associate professor with tenure ("application").

Petitioner was in the Department of Mechanical Engineering of the College of Engineering. Petitioner's department chair and the entire faculty of the Department of Mechanical Engineering strongly supported petitioner's application, praising petitioner's scholarship as well as his teaching and service accomplishments. The department chair observed that "[t]he students in the Department feel that [petitioner] is one of the excellent teachers in the College"; that petitioner "has an excellent record of attracting research

funds"; that the comments of the external reviewers regarding [petitioner's] publications were "quite favorable"; and that petitioner "has been quite active in the area of University service." The entire department faculty stated in a memorandum to the University Personnel Committee that petitioner "is an excellent teacher and his service record is very good." The department faculty memorandum also observed that "[i]n the area of research and scholarship, [petitioner's] performance has been superior. He has obtained over $300,000.00 in externally funded research which has strengthened the College's reputation in the area of engineering scholarship."

The College of Engineering Personnel Action Committee also strongly supported petitioner's application. This Committee observed that a review of the evidence established that petitioner was a "fully competent teacher"; that petitioner's scholarship was "outstanding"; and that "[i]n the area of professional service, [petitioner] has clearly performed well by actively participating in many committees at the department, College, and University levels."

In addition to the strong support from his department and from the College of Engineering Personnel Action Committee, the dean of the College of Engineering also supported petitioner's application. However, the dean's recommendation contained the comment

that "I hold little future for him as a full professor unless his work takes on a more fundamental flavor." This comment was extraneous because petitioner was applying for promotion to the rank of associate professor, not full professor. The dean recognized the irrelevancy of the remark by observing that "[a]t the Associate Professor level [petitioner] can continue the type of work he is presently undertaking."

Despite the uniformly favorable recommendations supporting the application at the department and college levels, the application ran into problems at the university-wide level. The university provost and the University Personnel Committee (a university-wide committee) opposed the application. The university president

agreed with these negative recommendations and therefore decided not to forward the application to the university's Board of Trustees. Petitioner then requested review by the university-wide Faculty Affairs Committee. However, the Faculty Affairs Committee declined to recommend reversal of the president's rejection of the application.

It has been respondents' position, both in the District Court and in the Sixth Circuit Court of Appeals, that the university president, the university provost, and the university-wide committees rejected petitioner's application, in substantial part, because petitioner's research was not sufficiently "fundamental", i.e., theoretical, as distinguished from

"applied". The College of Engineering dean testified at his deposition that he had no problem with petitioner's alleged "applied" orientation. However, petitioner's application was rejected at the university-wide level, according to respondents and the Sixth Circuit's opinion, because petitioner's engineering research was not sufficiently theoretical.

Shortly after the denial of petitioner's application, Cleveland State University hired a black professor, Dr. Joseph Akinmusuru ("Akinmusuru"), as a Visiting Associate Professor in the College of Engineering. Although the original intention was to hire Dr. Akinmusuru immediately as a regular faculty member, immigration problems (Dr. Akinmusuru was originally

from Africa) prevented such an appointment until the following year, when Dr. Akinmusuru was appointed Associate Professor in the College of Engineering. The evidence shows that Dr. Akinmusuru's research was far more "applied" in nature than petitioner's research. This fact is significant because the university's written research criteria for original appointment to the rank of associate professor are exactly the same as the university's written research criteria for promotion to the rank of associate professor. In addition, although Dr. Akinmusuru was not immediately given tenure, evidence in the record establishes that the university evaluates the research requirement for tenure at the time of appointment to the

rank of associate professor, even if tenure does not immediately accompany such appointment. Moreover, although Dr. Akinmusuru is in the Department of Civil Engineering of the College of Engineering and petitioner was in the Department of Mechanical Engineering of the College of Engineering, there is no evidence in the record of any differences in research requirements between these two departments.

The evidence shows that Dr. Akinmusuru was originally interviewed by the university in a conscious effort to promote affirmative action. His regular appointment to the rank of associate professor followed his visiting year, during which he gained esteem for an affirmative action report in which he emphasized, inter alia, the need for

minority faculty role models. A considerable amount of evidence in the record establishes that from and after January, 1987, the university was under severe political and media pressure to promote affirmative action. Consequently, the university trustees, the university president, and the university provost promulgated written and oral affirmative action directives to the deans and other faculty administrators. For example, in a November 17, 1987 letter to all university administrators, faculty, and staff, respondent Walter B. Waetjen ("Waetjen"), then President of the university, stated that "all University employees with supervisory, managerial, and executive responsibilities will be evaluated at least annually on their

performance pertaining to . . . affirmative action."

Such affirmative action pressures from the university trustees, the university president, and the university provost were not based on any findings of prior racial or other discrimination by Cleveland State University with regard to faculty personnel decisions. To the contrary, respondents have consistently maintained throughout this litigation that no such prior discrimination ever existed.

Respondent John A. Flower ("Flower") became Provost of Cleveland State University in 1978, Interim President (replacing respondent Waetjen) in July, 1988, and permanent President in October, 1988. In 1988 and 1989, Flower expressed strong support for

affirmative action as a means of correcting general societal discrimination and economic conditions. He testified in his deposition that he believed affirmative action was important for the purpose of providing minority role models. In a public speech, he stated that "[p]robably half or more" of the 765 blacks graduating with Ph.D.s each year in the United States are in the field of education. "The small pool that remains to satisfy Affirmative Action is up for grabs. There are 3,300 colleges and Universities in the country, all looking for qualified faculty. It doesn't take a Nobel Laureate to figure out that there are simply not enough qualified Black faculty to go around." Respondent Flower added that black

professors are "desperately needed in the engineering field."

At the time petitioner's application was being denied and Dr. Akinmusuru was being hired, all positions in the College of Engineering were being heavily scrutinized as a result of budgetary constraints. Respondent Anthony P. Ponter ("Ponter"), then Dean of the College of Engineering, testified at his deposition that "around that period I think a new system came in whereby [the College of Engineering] had to convince [the university budget committee] that there was a slot available [for new faculty positions] because of some deteriorating financial aspect of the university." Respondent Ponter stated that this new system "was instituted by the provost probably to

make sure that things weren't rubber stamped, that the monies were available. So there was a slowing up of all positions."

Petitioner's 1987-88 application was the second time he had applied for promotion to the rank of associate professor with tenure. His application in the 1986-87 academic year had also been denied. Under normal circumstances, the denial of petitioner's 1987-88 application would have resulted in the automatic termination of petitioner's employment with the university. However, his deadline for obtaining tenure had been extended by one year as a result of the April 24, 1987 determination of the Faculty Affairs Committee that the denial of petitioner's 1986-87

application had been tainted by a conflict of interest. The Faculty Affairs Committee found that the participation in petitioner's 1986-87 tenure proceedings of respondent A. Raouf Arafa ("Arafa"), a College of Engineering professor who "had expressed an interest" in obtaining the same tenured position, "was sufficiently significant and of such a major conflict of interest as to have tainted the entire process." Although petitioner thus could have stayed at the university another year and made a third consecutive application for promotion and tenure (promotion to associate professor was a prerequisite for tenure), petitioner chose to accept an offer of employment from NASA and resign from his employment at the university

rather than go through the time-consuming, expensive, emotional, and doubtlessly futile ordeal of yet another application. Had petitioner stayed at the university during the 1988-89 academic year, his employment would have been automatically terminated by the university unless he had obtained promotion and tenure before the end of that academic year. Under the circumstances, it is and has been petitioner's position that he was constructively discharged by the university's denial of his 1987-88 application.

Accordingly, petitioner's racial discrimination claim is predicated, in part, on the university's denial of his 1987-88 application for promotion to the rank of associate professor with tenure

in the College of Engineering, where the university's said denial was, according to respondents, substantially based on petitioner's alleged lack of theoretical, as distinguished from applied, publications, and where the university, pursuant to the high-pressure affirmative action tactics of respondents trustees, Waetjen, and Flower, soon thereafter appointed a black with far less theoretical scholarship to the position of associate professor in the College of Engineering, even though the research criteria for original appointment and promotion to the rank of associate professor are exactly the same.

The second part of petitioner's racial discrimination claim is based on the university's rejection of

petitioner's application for tenure on the expressed basis of alleged university-wide research standards while simultaneously granting tenure to a black Associate Professor of Education, Dr. Janice Hale-Benson ("Hale-Benson"), who demonstrably did not meet the written university-wide tenure requirement of being a fully competent teacher. In contrast to petitioner, whose application was strongly supported at the departmental and college levels, Dr. Hale-Benson's application was strongly opposed by her department and college (except that her dean, a new black appointee, eventually supported her application after an initial noncommittal recommendation). Dr. Hale-Benson's application was central to affirmative action politics at the

university during 1987 and 1988. When her 1986-87 application was denied, she hired Attorney George Forbes, the black Cleveland City Council President, to represent her. Dr. Hale-Benson's application became the focus of minority group political pressure on the university. Respondent Flower testified at his deposition that by March, 1987, he had read newspaper reports that Mr. Forbes was accusing Cleveland State University of racism. Flower also read reports that Mr. Forbes was threatening to hold up City Council vacation of certain public streets that were necessary to be vacated for the construction of Cleveland State University's proposed new Convocation Center. Respondents Waetjen, Flower, and the trustees granted tenure to Dr.

Hale-Benson in January, 1988, despite respondent Waetjen's admission in a letter to the College of Education faculty that there was no affirmative evidence that she met the university-wide tenure requirement of being a fully competent teacher. Petitioner's application for tenure was denied at the same time. Within a week of the announcement that Dr. Hale-Benson had been awarded tenure, the Cleveland City Council voted to vacate the streets for the new Cleveland State University Convocation Center.

Petitioner's additional (or alternative) claim for nonclass discrimination arises out of the disparate treatment by some of the respondents of petitioner in comparison to similarly situated white male

applicants for tenure in the College of Engineering. For example, respondent Arafa, who sabotaged petitioner's 1986-87 application because he was vying for the same position, was awarded tenure in January, 1988 at the same time petitioner was denied tenure. Respondent Arafa had a joint appointment in both the Mechanical Engineering and Engineering Technology Departments of the College of Engineering. Respondent Arafa's publications were considerably more "applied" than those of petitioner. Moreover, Flower, Waetjen, and other respondents credited types of publications for Arafa that they refused to credit for petitioner. Since petitioner left the university, Arafa has taught several courses that petitioner taught or could have taught.

Similarly, Flower, Waetjen, and other respondents credited types of publications of other College of Engineering applicants for promotion/tenure that they refused to credit for petitioner. Such disparate treatment lacked any rational basis. Although petitioner acknowledges that his claim for nonclass discrimination under the Equal Protection Clause must rest on intentional or purposeful discrimination, that issue was not raised by respondents in their motion for summary judgment in the District Court. Rather, the respondents relied on arguments that the "comparables" were not similarly situated and that a nonclass discrimination claim is not cognizable under the Equal Protection Clause. The District Court relied

solely on the legal premise that a nonclass equal protection claim is not justiciable in granting summary judgment for respondents on this claim (A60-A63), and the Court of Appeals affirmed on the same basis (A20-A23). Accordingly, although petitioner does have considerable evidence of intentional or purposeful discrimination with regard to his nonclass discrimination claim, that issue is not and will not be before the Court. The sole issue as to this claim is the legal issue of whether a nonclass discrimination claim, in the context of public university faculty promotion and tenure decisions, is cognizable under the Fourteenth Amendment Equal Protection Clause.

ARGUMENT

I. THE SIXTH CIRCUIT RULE THAT THE PLAINTIFF IN A REVERSE DISCRIMINATION EMPLOYMENT CASE MUST SUBMIT PROOF OF BACKGROUND CIRCUMSTANCES WHICH SUPPORT THE SUSPICION THAT THE DEFENDANT IS THAT UNUSUAL EMPLOYER WHO DISCRIMINATES AGAINST THE MAJORITY IS INCONSISTENT WITH MCDONALD V. SANTA FE TRAIL TRANSP. CO., 427 U.S. 273 (1976).

The legal analysis of the Sixth Circuit Court of Appeals in its June 3, 1991 opinion in the case at bar begins with the premise that "[i]n a reverse discrimination case, the plaintiff must submit proof of background circumstances which support the suspicion that 'the defendant is that unusual employer who discriminates against the majority . . .'" (A11-A12, quoting Murray v. Thistledown Racing Club, 770 F.2d 63, 67 (6th Cir. 1985).) This legal premise tracks respondents' arguments, made

throughout this litigation, that the statistics of white participation in the College of Engineering and university faculty do not support a conclusion of systematic discrimination against whites. The Sixth Circuit also sets forth these statistics in its opinion. (A9.) Although the Sixth Circuit's explicit holding on petitioner's racial discrimination claim involves another legal issue (discussed below), the foregoing legal premise that a reverse discrimination plaintiff must establish that the employer habitually discriminates against the majority appears to be an alternative or implicit holding of the Sixth Circuit opinion. (A11-A12.) Indeed, the last sentence of the Sixth Circuit opinion affirms the District Court's grant of summary

judgment to the respondents "[b]ecause [petitioner] has afforded no justiciable case showing that he is a member of a class that has suffered discrimination by the defendants in violation of the Equal Protection Clause . . . ." (A22-A23 (emphasis added).)

The aforesaid rule of the Sixth Circuit is totally in conflict with this Court's decision in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Justice Marshall, writing for all nine Justices of this Court, rejected the argument that the plaintiff in a reverse discrimination case must show across-the-board discrimination in favor of minorities. Id. at 280 n. 8. Similarly, in Village of Arlington Heights v. Metro. Housing Dev. Co., 429 U.S. 252, 266 n. 16 (1977), this Court

ruled that "a consistent pattern of official racial discrimination is [not] a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions."

Accordingly, the Sixth Circuit rule set forth above is in conflict with the decisions of this Court. The Sixth Circuit rule will clearly be applied to future cases within the Sixth Circuit unless and until this Court specifically reverses or overrules the Sixth Circuit on this important issue.

II. THE SIXTH CIRCUIT ERRED IN PROMULGATING A RULE OF LAW THAT ALLEGATIONS OF RACIAL DISCRIMINATION VIOLATIVE OF THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE IN PUBLIC UNIVERSITY FACULTY PROMOTION AND TENURE DECISIONS ARE NOT JUSTICIABLE UNLESS SUCH DISCRIMINATION CAN BE ESTABLISHED BY INTRADEPARTMENTAL COMPARISONS.

The Sixth Circuit held, in the case at bar, that "[a] denial of tenure by [sic[1]] the Mechanical Engineering Department should not be compared with a grant of tenure in the College of Education or Department of Civil Engineering." (A19.) The Sixth Circuit

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[1] The word "by" is apparently a typographical error, for it is undisputed that the university, not particular departments or colleges in the university, grants tenure. Moreover, the uncontroverted evidence shows that petitioner's department strongly supported his application for promotion and tenure.

promulgated the foregoing intradepartmental discrimination limitation as a rule of law, applicable to all faculty promotion and tenure cases, without consideration of the particular evidence in the case at bar. Indeed, the evidence in the case at bar does not support the Sixth Circuit's per se rule that academic racial discrimination can only be established by intradepartmental comparisons. No evidence exists that the research requirements of the Department of Civil Engineering are any different from the research requirements of the Department of Mechanical Engineering with regard to the theoretical/applied question. Moreover, the "fundamental" research requirement was belatedly imposed on petitioner not by petitioner's

department or college (both of which supported petitioner's application) but by the university provost, the university president, and two university-wide committees. Petitioner's application was rejected, according to respondents' own evidence, on the basis of unwritten university-wide criteria, not on the basis of departmental criteria. Accordingly, it is perfectly appropriate to compare the respondents' application of the "fundamental" research requirement to petitioner, who was in the Mechanical Engineering Department of the College of Engineering, with the failure of some of the respondents to apply the same "fundamental" research requirement to Dr. Akinmusuru, who was in the Civil

Engineering Department of the College of Engineering.

Similarly, it is perfectly appropriate to compare the application of the unwritten (and novel) university-wide "fundamental" research requirement to petitioner with the failure to apply the written (and well-established) university-wide requirement of being a fully competent teacher to Dr. Hale-Benson, who was in the College of Education. No distinctions between the College of Education and the College of Engineering are relevant in this context. Petitioner and Dr. Hale-Benson are proper "comparables" because new, unwritten university-wide standards were applied to deny petitioner's tenure application while well-established, written university-wide standards were

ignored in order to grant tenure to Dr. Hale-Benson.

As explained in the Statement of the Case, supra, the reason why the application of petitioner was denied and the applications of Dr. Akinmusuru and Dr. Hale-Benson were granted is that petitioner is white and Dr. Akinmusuru and Dr. Hale-Benson are black. These results were dictated by the aggressive affirmative action policies of respondents Flower, Waetjen, and the trustees. These policies were designed not just to meet equal employment opportunity legal requirements but rather to satisfy the much more demanding affirmative action desiderata of minority pressure groups in the community. As noted above, respondent Flower's affirmative action policies

were based on a desire to provide minority role models and to rectify general societal discrimination. No evidence exists that the university has ever discriminated against minorities in faculty promotion and tenure. Accordingly, these affirmative action policies violate the Fourteenth Amendment Equal Protection Clause. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

The Sixth Circuit's per se intradepartmental discrimination rule is unsupported by logic, evidence, or Supreme Court authority. The Sixth Circuit rule appears to be an attempt to limit judicial inquiry into racial discrimination at academic institutions. This Court has rejected such attempts in

the past. Univ. of Pa. v. EEOC, 493 U.S. --, 58 U.S.L.W. 4093, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). The Court should likewise reject the Sixth Circuit's per se rule in the instant case, for that rule will improperly and artificially limit judicial inquiry under the Equal Protection Clause[2] into racial discrimination in public university faculty personnel matters. Strict scrutiny, rather than cavalier

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[2] The Sixth Circuit's opinion strangely omits to mention that petitioner's racial discrimination claim was brought under the Fourteenth Amendment Equal Protection Clause and solely under the Fourteenth Amendment Equal Protection Clause. The Equal Protection Clause basis of petitioner's racial discrimination claim was clearly and explicitly stated in petitioner's amended complaint, summary judgment briefs, and appellate briefs.

deference to academic administrators, should govern judicial examination of governmental "race-conscious relief." City of Richmond v. J.A. Croson Co., 488 U.S. at 504-05.

III. THE SIXTH CIRCUIT RULE THAT A FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE CLAIM, IN THE CONTEXT OF PUBLIC UNIVERSITY FACULTY PROMOTION AND TENURE DECISIONS, REQUIRES A CLASS BASIS IS NOT CONSISTENT WITH DECISIONS OF THIS COURT.

As observed in the Statement of the Case, supra, petitioner's additional (or alternative) Fourteenth Amendment Equal Protection Clause claim is based on a theory of nonclass discrimination whereby some of the respondents applied different scholarship requirements to petitioner, as compared to other similarly situated white male applicants, without any rational basis. Although petitioner acknowledges that he

will have to show that such discrimination was intentional or purposeful, respondents did not raise this issue in their motion for summary judgment and subsequent briefs filed in the District Court, and the District Court did not consider it. Rather, the District Court and the Court of Appeals both held that such a claim is not cognizable under the Equal Protection Clause because it is not based on petitioner's membership in a class. (A20-A23, A60-61.)

Under the Fourteenth Amendment Equal Protection Clause, no State shall "deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.) The Equal Protection Clause says "person", not "classes of persons". In accordance

with the plain meaning of the Equal Protection Clause, the Supreme Court has applied the Clause to contexts in which the "person" was not considered to be a member of any class. Cochran v. Kansas, 316 U.S. 255, 257-58 (1942); McFarland v. American Sugar Co., 241 U.S. 79, 86-87 (1916). This Court has also recognized in dicta the applicability, in appropriate circumstances, of the Equal Protection Clause to individuals who are not members of any class. Snowden v. Hughes, 321 U.S. 1, 8-10 (1944); Backus v. Fort Street Union Depot Co., 169 U.S. 557, 571 (1898); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

Although the Sixth Circuit has recognized the applicability of the Equal Protection Clause, under

appropriate circumstances, to individuals not belonging to a class in other governmental employment contexts, Charles v. Baesler, 910 F.2d 1349, 1356-57 (6th Cir. 1990), the Sixth Circuit refuses to apply this principle in the case at bar out of a special deference to academic institutions. (A21-A22.) Of course, the wisdom of the multitude of ordinary governmental personnel decisions is not routinely reviewable under the Fourteenth Amendment Due Process Clause. Bishop v. Wood, 426 U.S. 341, 349-50 (1976). However, Bishop does not address the reviewability of governmental personnel decisions under the Equal Protection Clause. The precise issue of whether a class basis is a prerequisite of a Fourteenth Amendment Equal Protection

Clause claim, in the context of academic promotion and tenure decisions, is an important question of federal constitutional law which has not been, but should be, settled by this Court.

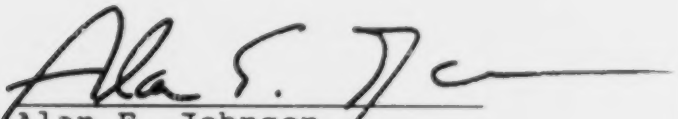
CONCLUSION

This case involves important constitutional issues as to the proper interpretation and application of the Fourteenth Amendment Equal Protection Clause in the context of public university faculty promotion and tenure decisions. The Sixth Circuit has promulgated a rule of law for reverse racial discrimination cases that is contrary to this Court's unanimous holding in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n. 8 (1976). Another Sixth Circuit per se rule improperly limits judicial scrutiny

of alleged racial discrimination in public university faculty promotion and tenure decisions to intradepartmental discrimination. Finally, with regard to petitioner's nonclass discrimination claim, the Sixth Circuit carves out a special exception for public university promotion and tenure decisions to the general rule that the Equal Protection Clause is applicable even to persons not belonging to any class. All of these issues involve significant constitutional questions that should be settled by this Court. Accordingly, petitioner requests the issuance of a writ of certiorari to review the judgment and opinion of the United

States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,



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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 3, 1991)

Not For Publication

No. 90-3759

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUSTIN L. EVANS,

Plaintiff-Appellant,

v.

CLEVELAND STATE UNIVERSITY BOARD OF TRUSTEES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio.

Before: RYAN and SUHRHEINRICH Circuit Judges; and MCRAE, Senior District Judge.*

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*The Honorable Robert M. McRae, Senior District Judge of the United States District Court for the Western District of Tennessee, sitting by designation.

RYAN, Circuit Judge. Plaintiff, Austin L. Evans, appeals the summary judgment for defendants in this civil rights action under 42 U.S.C. Section 1983, claiming reverse discrimination in his denial of tenure and promotion. This appeal addresses whether the district court properly granted defendants' motion for summary judgment on the ground that Evans failed to produce evidence which raises a genuine issue as to whether defendants refused to grant him tenure based upon his race or, as to whether his equal protection rights were violated. For the following reasons, we affirm.

I.

Evans, a white American male, filed this reverse discrimination action under 42 U.S.C. Section 1983 in January 1989

against the Cleveland State University Board of Trustees ("University") and twenty-eight University officials, alleging that he was treated differently from other candidates for tenure because of his race and national origin. Evans amended his complaint in March 1989 claiming that defendants also violated his Fourteenth Amendment right to equal protection by denying him tenure and promotion.

Evans was hired by the University in January 1982 as an instructor in the Department of Mechanical Engineering. In September 1984, after obtaining his doctorate degree in Mechanical Engineering, Evans was promoted to assistant professor. During the 1986-87 and 1987-88 academic years, he applied unsuccessfully for tenure and promotion

to associate professor. This action arises out of the denial of the 1987-1988 application for tenure.

At Cleveland State, a tenure application is first reviewed by a personnel action committee composed of faculty members within the respective college. It is then reviewed by the department chairperson, and then by the dean. In turn, the dean makes a recommendation to the provost. If the recommendations of the personnel action committee, the chairperson, or the dean are in conflict, or if the provost declines to support a candidate having favorable recommendations, the provost refers the application to the university personnel committee, which is composed of eight tenured faculty members. The

university personnel committee makes a recommendation to the provost who, in turn, makes a recommendation to the president of the University. The president recommends to the Board of Trustees the tenure applications he finds acceptable.

A candidate denied tenure may appeal to the faculty affairs committee which is composed of six faculty members. The faculty affairs committee reviews the application, invites the candidate to appear before it, and issues a written recommendation to the provost who in turn makes a final determination.

Tenure decisions are based upon the criteria set forth in sections 8.1.2.(a)(1) and 8.1.2.(a)(4) of the University Handbook. Section (a)(1)

provides that to be appointed to the University's faculty, the teacher must demonstrate: the highest standards in teaching; a working commitment to creative achievement; an increased responsibility in professional service; and a commitment to acceptable professional ethics and academic responsibility. Section (a)(4.c) provides that:

> [a]ppointment or promotion to the rank of associate professor is based on evidence that the candidate is a fully competent teacher. In addition, the candidate shall demonstrate significant scholarship beyond publication of material contained in his or her dissertation, or outstanding intellectual leadership beyond the University community or exceptional achievement as a teacher.

Evans' 1987-88 application was recommended by the personnel action

committee, the chairman, and the dean. However, the dean, in his letter of recommendation to the provost, expressed concern that Evans' application had been given a cursory examination and that Evans' scholarship needed to "take[] on a more fundamental flavor." The provost determined that although Evans met the standards of teaching, service, and professional ethics, his scholarship was lacking because it was concentrated in "applied engineering" rather than "fundamental or theoretical engineering." Apparently, applied engineering is concerned with adapting an equation to the design of a product; whereas, fundamental engineering develops a theory mathematically to arrive at a certain equation. Most scholars prefer fundamental scholarship

because applied scholarship is generally confidential work which is infrequently published and is less subject to critical evaluation.

Because of the dean's concern, the provost asked the university personnel committee to review Evans' application. The personnel committee agreed with the provost that Evans' scholarship was lacking and recommended that Evans' tenure application be denied. The provost and the president agreed with this recommendation, and Evans' application was not submitted to the Board of Trustees for its approval.

Evans unsuccessfully appealed to the faculty affairs committee. Thereafter, he resigned from his position, refusing the University's offer of a terminal contract and the

opportunity to reapply for tenure in 1988.

Evans was one of four assistant professors in the College of Engineering to apply for promotion and tenure in 1987. The other three applicants, two whites and one Asian, were granted tenure. University-wide, Evans was one of sixteen assistant professors to apply for tenure. Ten whites, one black and one Asian were promoted and given tenure; three whites, including Evans, and one Asian, were denied tenure. The College of Engineering had no black faculty members when Evans applied for tenure, and university-wide, only twenty-one out of approximately 535 full-time faculty members were black.

Evans filed this suit, alleging that the denial of his 1987-88 tenure

application constituted reverse discrimination based upon race and a denial of his equal protection right not to be treated differently from others similarly situated. Defendants moved for summary judgment on the ground that Evans had not submitted evidence of discrimination.[1] The district court granted defendants' motion, finding that there was not a genuine issue as to whether race played a role in the University's decision not to grant Evans tenure, and that Evans failed to state an equal protection claim.

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1. The Board of Trustees moved to dismiss the complaint against it on sovereign immunity grounds under the Eleventh Amendment, which the district court granted. This issue is not appealed.

II.

A.

Evans claims the district court erred in holding that there was no genuine issue of fact as to whether he was discriminated against on the basis of race.

Both Title VII and section 1983 provide relief for discriminatory employment practices of public employers. Gutzwiller v. Fenik, 860 F.2d 1317, 1325 (6th Cir. 1988). In a reverse discrimination case, the plaintiff must submit proof of background circumstances which support the suspicion that "the defendant is that unusual employer who discriminates against the majority," and proof that "the employer treated differently employees who were similarly situated

but not members of the protected group." Murray v. Thistledown Racing Club, 770 F.2d 63, 67 (6th Cir. 1985).

Additionally, in cases claiming a denial of tenure because of discrimination,

> for a plaintiff to succeed . . . the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's teaching abilities or the academic needs of the department or university. Absent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties and reviewing authorities.

Zahorik v. Cornell Univ., 729 F.2d 85, 94 (2d Cir. 1984).

Once the plaintiff has demonstrated a prima facie case of discrimination, the defendant must come forward with a legitimate, nondiscriminatory reason for its action, after which the plaintiff bears the burden of proving that the proffered reason is pretextual. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1398 (6th Cir. 1990), cert denied, 111 S. Ct. 952 (1991).

Assuming Evans has stated a prima facie case, defendants' articulated reason for denying Evans tenure is that Evans' scholarship was deficient. The evidence supporting this reason includes a letter from the provost to the university personnel committee requesting review of Evans' application.

In this letter, the provost questioned Evans' scholarship, in particular, three publications which were technical progress reports, that is, "applied" articles. The provost was hesitant to credit this "confidential research" because the research was not "part of the open scientific interchange which must characterize the scholarship of university faculty members." The provost also questioned three other publications, characterizing them as "Proceedings," which "are by no means the rigorous equivalent of publishing in refereed journals." The provost also commented that out of the twenty-one publications that Evans included in his tenure application, only five publications were "refereed."

Defendants' evidence also includes a letter from the university personnel committee, in which the committee agreed with the provost that "[t]he nature of some of [Evans'] work, being confidential and not widely disseminated, limits the open exchange of ideas and opportunities for critical evaluation. This is certainly not equivalent to the international status of many recognized journals of most disciplines."

This court and other courts have found that deficient scholarship is a legitimate nondiscriminatory reason to deny tenure. Langland v. Vanderbilt Univ., 772 F.2d 907 (6th Cir. 1985) (Table); see also Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344 (9th Cir. 1981), cert. denied, 459 U.S. 823

(1982). Consequently, we find that defendants have articulated a legitimate, nondiscriminatory reason for not promoting Evans, and to avoid summary judgment, Evans must demonstrate that defendants' rationale is pretextual. He may do this "either directly[,] by persuading the court that a discriminatory reason more likely motivated the employer or indirectly[,] by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

Evans claims that defendants' reason is pretextual because he was treated differently from black professors as a result of a voluntary affirmative action plan promulgated by two of the defendants after public criticisms of the University's equal

employment policy. Evans compares himself with a black associate professor in the College of Education, who was awarded tenure during the 1987-88 academic year, and with an untenured black associate professor, who was hired by the Department of Civil Engineering after Evans was denied tenure. Evans alleges that he was denied tenure even though his scholarship was as good as these other two black professors.

However, these comparisons are inappropriate because they do not raise to an inference of discrimination. As the Second Circuit noted in Zahorik, tenure decisions in academic settings involve a combination of factors which tend to set them apart from employment decisions generally:

> First, tenure contracts entail commitments both as to the

> length of time and collegial relationships which are unusual. . . . Second, academic tenure decisions are often non-competitive. . . . Third, university tenure decisions are usually highly decentralized. . . . Fourth, the number of factors considered in tenure decisions is quite extensive. . . . Fifth, tenure decisions are a source of unusually great disagreement. . . .
>
> . . . A denial of tenure by an English department simply cannot be compared with a grant of tenure in the physics or history departments. Even within a single department comparisons are difficult because the number of decisions within a particular period may be quite few, the decisions sometimes may be non-competitive and tenure files typically contain positive as well as negative evaluations, often in extravagant terms, sufficient to support either a grant or denial of tenure.

Zahorik, 729 F.2d at 92-93 (emphasis added).

Evans' comparison of a black associate professor in the College of Education and an untenured black associate professor in the Department of Civil Engineering is inappropriate. A denial of tenure by the Mechanical Engineering Department should not be compared with a grant of tenure in the College of Education or Department of Civil Engineering. In sum, Evans has not produced evidence sufficient to raise a genuine issue as to whether his race played a role in the University's refusal to grant him tenure. He has demonstrated only that his denial of tenure occurred in the context of disagreement about the scholarly merits of his academic work, which Zahorik specifically finds insufficient to support such a claim. Id. at 94.

Therefore, we affirm the district court's grant of summary judgment to defendants.

B.

Evans contends that he was treated differently from other professors who were similarly situated in violation of the Equal Protection Clause of the Fourteenth Amendment. He alleges that defendants did not apply the same standards in evaluating his scholarship as were used in evaluating the scholarship of three other tenured associate professors in the College of Engineering.

The Supreme Court has stated that in order to prevail on a claim of equal protection, there must be proof of discriminatory intent or purpose. Arlington Heights v. Metropolitan Hous.

Dev. Corp., 429 U.S. 252, 265-66 (1977). Similarly, this court has held that the denial of a faculty promotion or tenure based upon an evaluation of a faculty member's scholarly achievements is not judiciable in a federal court under a civil rights statute without evidence of sex or race discrimination. Gutzwiller, 860 F.2d at 1331. We recognized that the Supreme Court has made clear that:

> absent evidence of a constitutionally impermissible basis for a challenged academic decision -- such as sex or race discrimination -- courts and juries must be extremely reluctant to second guess the professional judgment of the academic decisionmakers. Only when the challenged decision is arbitrary and capricious, and without rational basis, may it be set aside upon judicial review.

Id. at 1331 (citing Regents of Univ. of Mich v. Ewing, 474 U.S. 214 (1984)).

In Gutzwiller, we cited with approval the decision of Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979), wherein, the Fourth Circuit held that the alleged failure of the defendant university to apply the same standards in evaluating plaintiff's qualification for promotion as were used "in the past" was not reviewable by a federal court in a civil rights action based upon a denial of equal protection. Id. at 640.

This court is in no position to evaluate Evans' academic credentials and the quality of his published scholarship or to compare them with other professors' credentials and writings in a civil rights action alleging a denial of equal protection. Because Evans has

afforded no justiciable case showing he is a member of a class that has suffered discrimination by the defendants in violation of the Equal Protection Clause of the Fourteenth Amendment, we affirm the district court's grant of summary judgment for defendants.

AFFIRMED.

MEMORANDUM OF OPINION OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

(Filed July 26, 1990)

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AUSTIN L. EVANS,	)	CASE NO.
	)	89CV0064
Plaintiff,	)	
	)	Judge John M.
	)	Manos
v.	)	
	)	
BOARD OF TRUSTEES	)	
OF CLEVELAND STATE	)	
UNIVERSITY, et al.,	)	
	)	MEMORANDUM OF
Defendants.	)	OPINION

On January 13, 1989, Austin L. Evans, plaintiff, filed this section 1983[1] action against the Cleveland State University ("University") Board of Trustees and twenty-eight University

1. To establish a claim under 42 U.S.C. Section 1983, Evans must show that he was deprived of a constitutional right (continued...)

officials.[2] In an amended complaint filed on March 6, 1989, he alleged that defendants violated his fourteenth amendment right to equal protection by denying him tenure and promotion to the rank of associate professor.[3] The case is before the court on the Board of Trustees' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and on the individual defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. For the following reasons, the motions are granted and this case is dismissed with prejudice.

I.

Evans is a white American-born male

1.(...continued)
and that the deprivation occurred under the color of state law. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

2. Jurisdiction is proper under 28 U.S.C. Sections 1331 and 1343.

who alleges that he was treated differently from other candidates for tenure because of his race and national origin, and without a rational basis. The defendants are the Board of Trustees, the individual trustees, and other University officials. The trustees and officials, and the positions they held at times material to this action, are as follows:

a. Members of the Board of Trustees - Henry J. Goodman, Annette G. Butler, Gerald H. Gordon, Edward F. Bell, Walter A. Burks, Jr., Darlene M. Levandosky, Ruth R. Miller,

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3. Additionally, Evans alleged claims under 42 U.S.C. Section 1983 for violations of his right to procedural and substantive due process and under 42 U.S.C. Sections 1985(3) and 1986 for violations of his right to equal protection. On October 5, 1989, the court granted Evans' motion to dismiss these claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

Diann G. Scaravilli, and Lyman H. Treadway.

b. Members of the Faculty Affairs Committee - Victor L. Streib, Carl Camden, Harold E. Dailey, Gary D. Engle, Kenneth M. Hoff, and Carol Takacs.

c. President - Walter B. Waetjen

d. Provost - John A. Flower

e. Vice-Provost - Barbara B. Green

f. Members of the University Personnel Committee - Joan E. Baker, James H. Burghart, Robert F. Hartley, Frank A. Johns, Dennis Keating, Sidney Kraus, Thomas Lewis, and Nicholas Moutafakis.

g. Dean of the College of Engineering - Anthony P. Ponter

h. Associate Professor of Mechanical Engineering A. Raouf Arafa

Evans was hired in January 1982 as an instructor in the University's Department of Mechanical Engineering. After obtaining his doctorate degree in

mechanical engineering, he was promoted to assistant professor effective September 14, 1984. During the 1986-87 and the 1987-88 academic years, he applied unsuccessfully for tenure and promotion to associate professor. This action arises out of the denial of his second application for tenure.

A.

The promotion and tenure of faculty members is governed by section 8.1 of the University Handbook. Exh. 1 to Flower Dep. Tenure is awarded only to faculty members holding the rank of professor or associate professor. Untenured faculty must attain tenure within certain time periods. An assistant professor must attain tenure and promotion to associate professor by the end of his sixth year of

employment.[4] An untenured associate professor with more than one year of full-time college teaching experience must attain tenure by the end of his third year of employment. If a candidate is denied tenure, he receives a one-year terminal contract and is afforded a second opportunity to apply for tenure.

Procedurally, a tenure application is first reviewed within the respective college by a Personnel Action Committee composed of college faculty members, then by the Department Chairperson, and then by the Dean. The Dean, in turn, makes a recommendation to the Provost.

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4. University policy provides that promotion to the rank of associate professor must be accompanied by the granting of tenure.

If the recommendations of the majority of the Personnel Action Committee, the Chairperson, or the Dean are in conflict, or if the Provost declines to support a candidate having uniformly favorable recommendations, the Provost refers the tenure application to the University Personnel Committee, which is composed of eight tenured members of the University faculty. The University Personnel Committee then makes a recommendation to the Provost who, in turn, makes a recommendation to the President. The President recommends to the Board of Trustees only the tenure applications of candidates he finds acceptable. The Board does not act on applications found unacceptable by the President.

A candidate denied tenure may appeal to the Faculty Affairs Committee, which is composed of six members of the University faculty.[5] The Faculty Affairs Committee reviews the candidate's application, invites the candidate to appear before it, and then issues a written recommendation to the Provost who makes a final determination.

Tenure decisions are based on the criteria set forth in sections 8.1.2.(a)(1)[6] and 8.1.2.(a)(4)[7] of the University Id. Essentially, candidates

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5. The Provost is an ex officio member of the Faculty Affairs Committee. However, he does not participate in tenure or promotion cases. scholarship, service, and professional ethics.

6. Section 8.1.2.(a)(1) sets forth the criteria for appointment to the University faculty. It provides in pertinent part:

(continued...)

6.(...continued)

1.a) Teaching. The highest standards are comprehensive knowledge of the field of study, thorough preparation, intense interest in students as well as sensitivity to student interest, openmindedness, independence and integrity, and above all, intellectual enthusiasm which is transmitted to students.

1.b) Creative Achievement. The standard of scholarship requires a working commitment to inquiry and research and to creative achievement. The University obligation for the generation of new knowledge and practices imposes a responsibility for creativity, whether in inquiry and investigation, writing, design and production, or in the performing and fine arts. In the best of scholars and the best of teachers, creative inquiry is joined with effective classroom teaching.

1.c) Professional Service. A university faculty member is 'a citizen, a member of a learned profession, and an officer of an educational institution.' After a period of personal growth in which she or he is encouraged to

6.(...continued)

develop his or her abilities as a teacher and creative scholar, a faculty member may properly be expected to assume increased responsibility, in keeping with his or her professional interest, for the government of the University, the standards of his or her discipline, and the welfare of the civic community.

1.d) Professional Ethics and Academic Responsibility. Commitment to acceptable professional ethics and academic responsibility shall be a relevant consideration in appointments and promotion.

Exh. 1 to Flower dep. at 1-2 (footnote omitted).

7. In addition to maintaining the standards of academic rank under section 8.1.2(a)(1), an assistant professor seeking tenure and promotion to the rank of associate professor must meet the standards set forth in 8.1.2(a)(4.c), which states in pertinent part:

> Associate Professor. Appointment or promotion to the rank of associate professor is based on evidence that the candidate is a fully competent teacher. In addition, the
>
> (continued...)

are evaluated on the basis of teaching, scholarship, service, and professional ethics.

B.

Upon his promotion to Assistant Professor of Mechanical Engineering in 1984, Evans received a tenure date of January 15, 1987. That is, if he was not promoted and granted tenure during the 1986-87 academic year, he could accept a terminal contract for the 1987-

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7.(...continued)
candidate shall demonstrate significant scholarship beyond publication of material contained in his or her dissertation, or outstanding intellectual leadership beyond the University community or exceptional achievement as a teacher.

Exh. 1 to Flower dep. at 3. An award of tenure to a candidate already holding the rank of associate professor is based on evidence that the candidate has continued to maintain the above standards.

88 academic year and reapply for tenure. Evans' 1986-87 application was unsuccessful and as a result, he appealed to the Faculty Affairs Committee. Because of the possibility that a conflict of interest had tainted the tenure review process, Flower adopted the recommendation of the Faculty Affairs Committee that Evans be given a new tenure date of January 15, 1988 and that he be permitted to apply for tenure as if it were his first application.[8]

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8. The perceived conflict of interest stemmed from the fact that A. Raouf Arafa served on the College of Engineering Personnel Action Committee, which initially reviewed Evans' application, while competing with Evans for a tenured position in the Department of Mechanical Engineering. Neither the Faculty Affairs Committee nor Flower found any evidence of wrongdoing on the part of Arafa. Exh. E to Defendants' Motion for Summary Judgment.

Evans' 1987-88 application was favorably recommended by the College of Engineering Personnel Action Committee, the Chairman of the Department of Mechanical Engineering, and Dean Ponter. In his letter of recommendation to Provost Flower, however, Ponter expressed concern that Evans' application had been given a cursory examination and that his scholarship needed to "take[] on a more fundamental flavor." Exh. F to Defendants' Motion for Summary Judgment.

Flower determined that although Evans met the standards of teaching, service, and ethics, his scholarship was deficient because it was concentrated in "applied engineering" rather than "fundamental or theoretical

engineering."[9] Most academicians favor fundamental scholarship over applied scholarship on the ground that the latter is usually confidential work which is infrequently published, and thus less subject to critical evaluation. Because of this, Flower asked the University Personnel Committee to review Evans' application. Finding the same deficiency in scholarship, the University Personnel Committee recommended that Evans be denied tenure by a vote of five to three. Flower and President Waetjen agreed with the recommendation and Evans' application was not submitted to the Board of

9. "Applied engineering" takes an equation and adapts it to the design of a product; "fundamental or theoretical engineering" is the development of a theory mathematically to arrive at a certain equation. Ponter dep. at 126-31.

Trustees.

Evans' second appeal to the Faculty Affairs Committee was unsuccessful. He then resigned, refusing the University's offer of a terminal contract and an opportunity to reapply for tenure in 1988.

C.

Evans was one of four assistant professors in the College of Engineering to apply for promotion and tenure in 1987. The other three applicants, two whites and one Asian, were granted tenure. University-wide, Evans was one of sixteen professors to apply for promotion and tenure. Ten whites, one black, and one Asian were promoted and given tenure; three whites, including Evans, and one Asian were denied promotion and tenure.

Additionally in 1987, three white associate professors in the College of Engineering were granted tenure. University-wide, six white associate professors and one black associate professor were granted tenure; one white associate professor was denied tenure.

The College of Engineering had no black faculty members when Evans applied for tenure. University-wide, 21 of the approximately 535 full-time faculty members were black.[10]

D.

Evans alleges that the denial of his 1987-88 application for tenure constituted reverse discrimination based on race and national origin and a denial of his right not to be treated

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10. The University does not keep information pertaining to national origin.

differently from others similarly situated for irrational reasons. He seeks damages and prospective declaratory and injunctive relief. [11]

Defendants deny that Evans was treated differently because of his race and national origin, and without a rational basis. Further, the Board of Trustees moves to dismiss the complaint against it on sovereign immunity grounds under the eleventh amendment. [12] The individual defendants seek summary judgment on the ground that Evans has

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11. The claim for damages is brought against all individual defendants in their personal capacities. The claim for prospective declaratory and injunctive relief is brought against the Board of Trustees, and the trustees themselves, Flower, and Green in their official capacities.

12. The eleventh amendment provides that:

(continued...)

not submitted any evidence of class-based discrimination.

II.

Initially, the court must address the Board of Trustees' motion to dismiss the complaint against it for lack of jurisdiction under Fed R. Civ. P. 12(b)(1). The Board of Trustees is sued for prospective declaratory and injunctive relief.[13] Regardless of the relief sought, however, the eleventh

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12.(...continued)
The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

13. Specifically, Evans seeks a declaratory judgment that his right to equal protection was violated and an injunction ordering reinstatement with promotion to associate professor and tenure or, in the alternative, front pay.

amendment bars suit against a state and certain public agencies of the state. Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). The immunity afforded a public agency depends on whether the agency should be treated as an arm or alter ego of the state, or as a political subdivision. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Hall v. Medical College of Ohio, 742 F.2d 299, 301 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985). Public agencies which are an arm of the state are immune; political subdivisions are not. Doyle, 429 U.S. at 280; Hall, 742 F.2d at 301.

Here, it is undisputed that the

University is an arm of the State of Ohio. The Board of Trustees is an entity created by statute for the purpose of governing the University. See **Ohio Rev. Code Ann.** Section 3344.01(A) (Anderson 1985 & Supp. 1989). The individual trustees are appointed by the Governor with the advice and consent of the Ohio Senate. Id. Thus given its close relationship with the University and limited autonomy, the court holds that the Board of Trustees is an arm of the State of Ohio entitled to eleventh amendment immunity. Accord Harden v. Adams, 760 F.2d 1158, 1164 (11th Cir.), reh'g denied, 767 F.2d 938 (11th Cir.), cert. denied sub nom. Grimmer v. Harden, 474 U.S. 1007 (1985); Narumanchi v. Board of Trustees, 43 Fair Empl. Prac. Cas. (BNA) 815, 819-20 (D. Conn. 1986);

Davis v. Alabama State Univ., 613 F. Supp. 134, 139-40 (M.D. Ala. 1985); Accordingly, Evans' claims against the Board of Trustees are dismissed. [14]

III.

Each of the individual defendants seek summary judgment on Evans' equal protection claims. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

14. Under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), the eleventh amendment does not bar Evans' claim for prospective declaratory and injunctive relief against the trustees, Flower, and Green in their official capacities.

entitled to a judgment as a matter of law." **Fed. R. Civ. P. 56(c).** The substantive law identifies what facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The movant bears the initial burden "of informing the court of the basis for its motion and identifying those portions of the record demonstrating the absence of a material issue of fact." Vollrath v. Georgia-Pacific Corp., 899 F.2d 533, 535 (6th Cir. 1990). Once a properly supported motion for summary judgment is made, the adverse party must present "specific facts showing that there is a genuine issue for trial." **Fed. R. Civ. P. 56(e).** If the adverse party submits evidence that is "merely colorable" or "not significantly

probative," summary judgment may be granted. Anderson, 477 U.S. at 249-50.

A.

Evans' first and second equal protection claims allege respectively discrimination on the basis of race and national origin.[15] To avoid summary judgment, he must come forward with sufficient evidence to create a justiciable issue as to whether the defendants intentionally discriminated against him. See Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (a prevailing equal

15. In his complaint, Evans also alleged gender discrimination. However, he offers no evidence in support of this allegation nor does he argue that defendants so discriminated. Accordingly, defendants are granted summary judgment on this claim.

protection claim requires proof of discriminatory motive or purpose); Washington v. Davis, 426 U.S. 229, 240 (1976) (same). Because direct evidence of purposeful discrimination is rarely available, the order and allocation of proof applicable in a disparate treatment case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., is used in adjudicating equal protection claims. Gutzwiller v. Fenik, 860 F.2d 1317, 1325 (6th Cir. 1988); Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1011 (6th Cir. 1987); Daniels v. Board of Educ., 805 F.2d 203, 207 (6th Cir. 1986); Grano v. Department of Dev., 637 F.2d 1073, 1081-82 (6th Cir. 1980).

Evans bears the initial burden of proving by a preponderance of the evidence a prima facie case that the denial of tenure was motivated by a discriminatory animus. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If he succeeds, the burden shifts to the defendants to articulate some legitimate, nondiscriminatory reason for the denial of tenure. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). By satisfying this burden, the presumption created by the prima facie showing drops from the case. Id. at 254-55. Evans must then prove by a preponderance of the evidence that the proffered reason is pretextual and that the defendants intentionally discriminated against him. Id. at 256.

For Evans to succeed in carrying his ultimate burden of persuasion:

> the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university. Absent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities.

Zahorik v. Cornell Univ., 729 F.2d 85, 94 (2d Cir. 1984).

1.

Defendants support their motion for summary judgment with evidence establishing that Evans was denied tenure because of deficient scholarship, not because of his race or nationality. In his letter to the University Personnel Committee requesting review of Evans' application, Provost Flower stated:

> The issue, as I see it, turns on the nature and quality of [Evans'] research and scholarship, particularly publication. He has been very effective in obtaining external funding.
>
> He lists 21 publications. Of these, five preceded his arrival at CSU. Of the remaining 16, Dr. Evans states that five are refereed. I will comment on the 16, beginning with item 6.
>
> Item 6, co-authored with his dissertation advisor, was published in a Conference

Proceedings prior to Evans' receipt of the Ph.D.

Item 7, also co-authored with R.L. Reid, was also published in a Proceedings and presumably was based on work done at Tennessee.

Item 8 is a single-authored paper published in a Proceedings.

Items 9, 15, 16, 20, 21 are internal NASA LeRC Reports.

Items 10 through 14 and 17 are Battelle monthly technical progress reports, co-authored and not for general release. I am hesitant to credit confidential research which is not part of the open scientific interchange which must characterize the scholarship of university faculty members.

Items 18 and 19 are listed by Dr. Evans as refereed; they appear to be Proceedings. These two items, along with item 8, constitute the post-doctoral published refereed work of Dr. Evans. Proceedings are 'lightly refereed' and, as I understand the situation in Engineering, are by no means the rigorous equivalent of publishing in refereed journals.

Exh. F. to Defendants' Motion for Summary Judgment. The University Personnel Committee concurred:

> Whether Dr. Evans has demonstrated sufficient evidence of scholarship is the key question in this case. The nature of some of his work, being confidential and not widely disseminated, limits the open exchange of ideas and opportunities for critical evaluation. This is certainly not equivalent to the international status of many recognized journals of most disciplines.

Id. "Without doubt, deficient scholarship is a legitimate, non-discriminatory reason to deny . . . tenure[.]"[16] Lynn v. Regents of

16. Because defendants successfully articulate a legitimate,

16.(...continued)
nondiscriminatory reason for the denial of tenure, the court need not determine whether Evans established a prima facie case of tenure discrimination based on race or national origin. See United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (when defendant does everything that would be required if plaintiff had made out a prima facie case, whether plaintiff was successful is no longer relevant). Nonetheless, the court notes that Evans produced no evidence that the trustees or Vice-Provost Green even voted on his application so as to give rise to a claim of discrimination. Further, in light of the statistical analysis of the 1987-88 tenure decisions, supra Part I, it is questionable whether Evans could establish a prima facie case of race discrimination. See Murray v. Thistledown Racing Club, 770 F.2d 63, 67 (1985) (a prima facie case of reverse discrimination requires proof of background circumstances which support the suspicion that the defendant is the unusual employer who discriminates against the majority).

the Univ. of Cal., 656 F.2d 1337, 1344 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982).

2.

To avoid summary judgment, Evans must proffer significantly probative evidence which could support a finding that defendants' rationale was pretextual. He may succeed in making this necessary showing "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

Evans' attempt to show that defendants' rationale was a pretext for race discrimination has two parts. First, he asserts that he was denied

tenure because of a voluntary affirmative action plan promulgated by Waetjen and Flower after public criticism of the University's equal employment policy. Brief in Opposition at 16-26. However, he offers no evidence that the University has such a plan; rather he relies on the fact that the University is required to comply with Executive Order 11246, which requires all employers doing business with the federal government, including institutions of higher learning, to submit to an affirmative action plan for minorities. See Buckley Aff. at Paragraphs 2-3; See generally 2 **A. Larson & L. Larson, Employment Discrimination** Sections 61.30-32 (1989) (affirmative action requirements for nonconstruction contractors).

Compliance with a mandatory lawful affirmative action plan is not discriminatory. Cf. Christensen v. Equitable Life Assurance Soc'y, 767 F.2d 340, 343 (7th Cir. 1985) (an employer's voluntary affirmative action plan is not evidence of discrimination against the majority), cert. denied, 474 U.S. 1102 (1986). Moreover, Evans offers no evidence that he was denied tenure because of the University's compliance with Executive Order 11246. See McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659, 666 (1987) (validity of affirmative action plan not an issue unless plaintiff establishes a causal connection between the plan and adverse employment action), cert. denied, 485 U.S. 914 (1988).

Second, Evans contends that his scholarship was as good or better than that of a black associate professor in the College of Educations who was awarded tenure during the 1987-88 academic year, and that of an untenured black associate professor who was hired by the Department of Civil Engineering after Evans was denied tenure. Brief in Opposition at 24-33. These comparisons are inappropriate and as such, they do not give rise to an inference of discrimination.[17] As stated in Zahorik, 729 F.2d at 93:

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17. Moreover, this evidence has no comparative value. In the case of the black associate professor in the College of Education, scholarship was not an issue in the decision to grant her or . Lesh-Laurie Aff. at Paragraph 11. In the case of the associate black professor in the Department of Civil Engineering, tenure was not an issue in his hiring. Lesh-Laurie Supp. Aff. at Paragraph 1.

> A denial of tenure by an English department simply cannot be compared with a grant of tenure in the physics or history departments. Even within a single department comparisons are difficult because the number of decisions within a particular period may be quite few, the decisions sometimes may be non-competitive and tenure files typically contain positive as well as negative evaluations, often in extravagant terms, sufficient to support either a grant or denial of tenure.

Evans' proffered evidence of ethnic discrimination is even weaker. He argues that discrimination may be inferred from the fact that Dean Ponter is British and from a statistical study of tenure decisions in the College of Engineering showing that while Ponter was Dean from 1984 until 1988, 100% of foreign-born engineering professors received tenure as compared to 56% of American-born professors. Brief in

Opposition at 34. Ponter's national origin, however, is not probative evidence of discrimination.[18] See Plummer v. Bolger, 559 F. Supp 324, 329 (D.D.C.), aff'd without opinion, 721 F.2d 1424 (D.C. Cir. 1983). Further, the statistical study, even if reliable,[19] is insufficient to prove that Evans was one of the candidates who was allegedly treated in a biased manner. See Zahorik, 729 F.2d at 95.

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18. Any evidence of discriminatory intent on the part of Ponter is further negated by the fact that he supported Evans' tenure application.

19. Defendants argue that the study is misleading because the statistical pool is based on the number of tenure decisions from 1984 until 1988 (eighteen) as opposed to the number of individuals who applied for tenure (thirteen). Use of the former number leads to an inaccurate result because several American-born professors were unsuccessful in their first request for tenure, but successful in their second request. See Reply Brief at 19.

In sum, Evans has not produced any evidence which raises a genuine issue as to whether his race or nationality played a role in the University's refusal to grant him tenure. Accordingly, defendants are granted summary judgment on Evans' first and second equal protection claims.

B.

Finally, Evans asserts a violation of his right not to be treated differently from others similarly situated for improper reasons. Specifically, he alleges that defendants did not apply the same standards in evaluating his scholarship as were used in evaluating the scholarship of three other tenured associate professors in the College of Engineering. This claim is not justiciable under the equal

protection clause because it does not involve class-based discrimination. To hold otherwise would convert this court into a "Super-Tenure Review Committee."[20] Keddie v. Pennsylvania

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20. As explained by the court in Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979):

> A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests. These determinations are in 'an area in which school officials must remain free to exercise their judgment' especially since these determinations present unique questions for judgment by those with expertise in the specialized academic area, capable of making professional evaluations of those elusive and intangible qualities and talents expected of the

(continued...)

Id. at 639-40.

State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976); Wells v. Doland, 711 F.2d 670, 675 (5th Cir. 1983); Clark v. Whiting, 607 F.2d 634, 638-41 (4th Cir. 1979); Faro v. New York Univ., 502 F.2d 1229, 1232-32 (2d Cir. 1974).

Accordingly, defendants are granted

20.(...continued)
scholar and teacher. Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts on faculty promotions or to engage independently in an intelligent informal comparison of the scholarly contributions or teaching talents of one faculty member denied promotion with those of another faculty member granted a promotion; in short, courts may not engage in 'second-guessing' the University authorities in connection with faculty promotions. Yet that is exactly what the plaintiff seeks by his action to have the court do.

summary judgment on Evans' third equal protection claim.

IV.

For the above-stated reasons, the Board of Trustees' motion to dismiss is granted pursuant to **Fed. R. Civ. P.** 12(b)(1), the individual defendants' motion for summary judgment is granted pursuant to **Fed. R. Civ. P.** 56, and this case is dismissed with prejudice.[21]

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

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21. Defendants seek sanctions under **Fed. R. Civ. P.** 11. Because "[i]t is not per se unreasonable to initiate a law suit and pursue a possible claim where the defendant may have a strong defense," defendants' motion is denied. Mihalik v. Pro Arts, Inc., 851 F.2d 790, 794 (6th Cir. 1988).

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(Filed July 26, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AUSTIN L. EVANS,	)	CASE NO. 98CV0064
	)	
Plaintiff,	)	
	)	
v.	)	JUDGE JOHN M. MANOS
	)	
BOARD OF TRUSTEES OF CLEVELAND STATE UNIVERSITY, et al.,	)	
	)	ORDER
Defendants.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Board of Trustees' motion to dismiss is granted pursuant to Fed. R. Civ. P. 12(b)(1), the individual defendants' motion for summary judgment is granted pursuant to Fed. R. Civ. P.

56, and the case is dismissed with prejudice.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

ORDER OF THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT
DENYING PETITION FOR
REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Filed July 12, 1991)

No. 90-3759

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUSTIN L. EVANS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	ORDER
CLEVELAND STATE	)	
UNIVERSITY BOARD OF	)	
TRUSTEES, ET AL.,	)	
	)	
Defendants-Appellees	)	

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and McRAE*, Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also

to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

*Hon. Robert M. McRae sitting by designation from the Western District of Tennessee

Supreme Court, U.S.
FILED
NOV 8 1991
OFFICE OF THE CLERK

(2)

No. 91-600

IN THE

Supreme Court of the United States

October Term, 1991

AUSTIN L. EVANS,
Petitioner,

vs.

HENRY L. GOODMAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether in the absence of direct evidence of racial discrimination, the plaintiff in an individual reverse discrimination action may be required, as part of his presumptive *prima facie* case, to establish that background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority.

II. Whether the courts below correctly held that a state university professor who unsuccessfully sought promotion to the rank of Associate Professor of Mechanical Engineering, with tenure, in the College of Engineering, had failed to establish a case of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by using as comparables a candidate for tenure in the Department of Specialized Instructional Programs, College of Education, and a candidate for hire as an untenured Visiting Professor of Civil Engineering, College of Engineering.

III. Whether a university professor can maintain a claim for the alleged deprivation of his equal protection rights by a state university in the denial of promotion with tenure when the alleged deprivation is not premised on racial, ethnic or other class animus but on a qualitative consideration of academic scholarship.

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No. 91-600

IN THE

Supreme Court of the United States

October Term, 1991

AUSTIN L. EVANS,
Petitioner,

vs.

HENRY L. GOODMAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is an American-born, white male who unsuccessfully sought a promotion to the rank of Associate Professor with tenure in the Department of Mechanical Engineering, Fenn College of Engineering (the "College"), Cleveland State University (the "University") in January, 1988. Respondents are the nine members of the University's Board of Trustees, the six members of the Faculty Affairs Committee, the eight members of the University Personnel Committee, the President and former Provost, the former President, the Interim Vice President for Academic Affairs, the Dean of the College of Engineering and an Associate Professor in the Mechanical Engineering Department.

Petitioner claims that he was discriminated against on the basis of his race because (1) on the same day he was denied his request for promotion with tenure, the University granted tenure to Janice Hale-Benson ("Hale-Benson"), a black female who was then an untenured Associate Professor in the Department of Specialized Instructional Programs, College of Education; and (2) several months after his request was denied, the Department of Civil Engineering hired Joseph Akinmusuru ("Akinmusuru"), a black, as a Visiting Associate Professor without tenure. Petitioner also claims that he was denied promotion with tenure on the basis of non-class-related animus against him because in January, 1988 and in January, 1986 other white males in the College with allegedly similar scholarly records had obtained tenure/promotion. The main issue in Petitioner's request for promotion to Associate Professor with tenure had been his scholarship, as evidenced by his publication record.

After discovery was completed, Petitioner's claims were dismissed by the trial Court on Respondents' Motion for Summary Judgment. With respect to the reverse discrimination claims, the trial Court ruled that since Respondents had successfully articulated a legitimate, nondiscriminatory reason for the denial of promotion with tenure, it would not rule on whether Petitioner had established a *prima facie* case of reverse discrimination but would assume that he did (R. 71: Memorandum of Opinion at 15 fn. 16). The trial Court further found that Petitioner had failed to meet his burden of proof on the issue of "pretext" because he did not show that a discriminatory reason more likely motivated the decision at issue and because the comparisons to Hale-Benson and Akinmusuru were inappropriate as the facts involving these two individuals were dissimilar (*Id.* at 15-18). The trial Court also ruled that Petitioner's other claim of unequal treatment in the consideration of his scholarly record was not justiciable under the Equal Protection Clause because it did not involve class-based discrimination. The trial Court declined to serve as a "super-tenure review committee", noting that academic determinations require discretionary judgments by professional experts on elusive and intangible academic qualities and talents which courts are not qualified to review (*Id.* at 18-19). In total agreement with the trial Court, the U.S. Court of Appeals for the Sixth Circuit affirmed.

The facts at issue in this case are straightforward. Petitioner was hired by the University in the Department of Mechanical Engineering in January, 1982 while he was still completing the requirements for a Ph.D. at the University of Tennessee. Upon completion of the Ph.D. requirements, he was promoted to Assistant Professor and, pursuant to the University's policies, was

given a tenure date. He first applied for promotion to the rank of Associate Professor with tenure in the Fall of 1986 and did not obtain it. Due to a potential conflict of interest by one of the individuals involved in the process, the Provost expunged that application and gave Petitioner an opportunity for a *de novo* consideration of his request in the following academic year, thus extending his tenure date by one year.

Petitioner's Fall 1987 request for promotion to Associate Professor with tenure was supported, by a vote of 5 in favor and one against, by the College Personnel Action Committee ("PAC"), the first academic committee charged by University policies with the review of candidates for promotion and tenure. The Chair of his Department and the Dean of the College supported Petitioner's request for promotion, and, pursuant to University policies, sent their recommendations to the Provost. Because the Provost had concerns about the nature and quality of Petitioner's research and scholarship, particularly publication, the Provost, as provided for in the University's policies, referred his request for promotion to the University Personnel Committee ("UPC") for its advice. The UPC consists of eight tenured faculty members elected by the faculty and is the most prestigious academic committee on campus. The UPC, by a vote of 5 to 3, recommended that Petitioner's request for promotion and tenure be denied. The Provost agreed with the UPC's recommendations. After the Provost and the President discussed Petitioner's request, the President did not recommend Petitioner's promotion to the Board of Trustees.

Under the University's policies, Petitioner appealed the denial of his request for promotion with tenure to the Faculty Affairs Committee ("FAC"). This Committee, composed of six faculty members elected by the

members of the Faculty Council, reviewed his dossier, obtained additional information, held a hearing on March 7, 1988 and discussed the case in executive session on five occasions. As a result of this considerable investigation and review, the FAC found that Petitioner had failed to establish that the denial of his application for promotion and tenure was improper.

All the individuals who were involved in this process are white.

The main issue in Petitioner's request for promotion was the nature and quality of his research and scholarship. Of the 21 publications listed in his request for promotion, 5 were published prior to his employment with the University, while he still had not completed his doctorate. Of the remaining 16 publications, only 5 were refereed. The others were conference proceedings, internal National Aeronautics and Space Administration ("NASA") reports and Battelle monthly technical progress reports. These types of publications are not the equivalent of publishing in refereed journals. A number of the publications were also co-authored. Moreover, the NASA and Battelle reports are not for general release. Both the Provost and the UPC were hesitant to credit that confidential research given the fact that confidentiality is not part of the open scientific interchange which characterizes academic scholarship and critical evaluation.

In addition, Petitioner's research has essentially been "applied" research, as opposed to fundamental (theoretical) research. Fundamental research in engineering develops a theory mathematically to arrive at a certain equation. Applied research takes an equation and converts it into the design of, for example, a piece of equipment. Traditionally, universities have been

exclusively concerned with fundamental (theoretical) research and it is only within the last five years that *some* universities have been accepting applied research as a legitimate scholarship area, *for limited purposes.* There is a controversy on the issue in academic circles and even the few universities that accept applied research would not accept it for promotions beyond the Associate Professor level. While the then Dean of the College is receptive to the idea that applied research has a place in academia, his view is not shared by others at the University, nor is it shared by the majority of American universities. One of the problems in applied research is that there are very few journals where it can be published. It is then difficult for others to evaluate the research. The Dean had indicated to Petitioner the academic concerns and limitations about applied research. Petitioner nevertheless chose to pursue the applied research path.

Contrary to Petitioner's suggestion, it was not improper for the Provost to refer this matter to the UPC. By University policy, the Provost had the authority to refer Petitioner's request for promotion to the UPC for its advice even though the College PAC, the Chair of his Department and the Dean of the College favored the promotion. The tenure process is a peer review process with "checks and balances" built into it and the UPC is one of those checks and balances. This group of respected elected tenured faculty members representing the different colleges and the different goals of a pluralistic university does assist the Provost in difficult decisions. In order to do so, the UPC solicits information *from the candidate* and reaches an independent conclusion. The UPC, being further removed from the immediate colleagues in a department or college, can provide a valuable peer evaluation, at arm's length.

In sum, Petitioner's research activities were viewed differently by different individuals involved in the peer evaluation process. Although there is room for disagreement in academic peer evaluations, the system ultimately operates by consensus. Petitioner failed to convince a substantial majority of tenured faculty that he possessed the level of scholarship required for promotion to the rank of Associate Professor with tenure.

Although Petitioner would have received a terminal contract for academic year 1988-1989 and, in accord with University policies, could have reapplied for promotion again in the Fall of 1988, he resigned at the end of the 1987-1988 academic year after securing employment with NASA Lewis Research Center in Cleveland, Ohio.

There were three other candidates for promotion to Associate Professor with tenure in the College in academic year 1987-1988. Two are white and one is Asian. All were promoted. The previous year there had been two candidates, one white and one Asian, and both were promoted to Associate Professor with tenure. In addition, three individuals who were initially hired as untenured Associate Professors in the College were considered for tenure during academic year 1987-1988 and all obtained tenure. All are white males.

At the time of Petitioner's employment, there were no black faculty members in his College. The faculty in the College consisted of approximately forty-three white males, eleven Asian/Pacific males and one Asian female. Akinmusuru, whom Petitioner attempted to use as a comparable, was hired as a Visiting Associate Professor in the Civil Engineering Department in academic year 1988-1989. He became an Associate Professor *without tenure* in the same department the following academic

year and his tenure date is January 15, 1992. In order to obtain tenure in 1992 Akinmusuru must undergo the same process as Petitioner. Akinmusuru did not apply for a position at the University until after Petitioner's request for promotion had been denied. He had been originally interviewed for a position in the department which was initially offered to *another* candidate, *a white male* who declined the position. Akinmusuru had obtained his Ph.D. in 1978, had taught Civil Engineering at the University of Ife (Nigeria) from October 1973 to September, 1987 and was a Visiting Professor in the Department of Civil Engineering at the University of Michigan during academic year 1987-1988. At the time of hire by the University he had published 18 articles and had submitted another 5 for publication. Neither Respondents UPC members nor Respondents FAC members participated in the decision to hire Akinmusuru.

University-wide, ten whites, one black and one Asian were promoted to Associate Professor with tenure during academic year 1987-1988. Three whites and one Asian were denied promotion to that rank with tenure. Of eight individuals University-wide who sought tenure only during the same academic year six whites and one black received tenure. One white individual was denied tenure.

During academic year 1987-1988 there were approximately 535 full-time faculty members at the University, which is an urban university located in the downtown area of the City of Cleveland. Of the 535 faculty members, 21 are black. The number of black faculty members in 1989 was 27.

There is no allegation that the University's standards for promotion and tenure make distinctions on the basis of race. There is no allegation that the

University's standards for promotion and tenure contain racial "quotas", "set asides" or numerical "preferences". Because, at all relevant times, the University has been considered by the federal government to be a government contractor subject to Executive Order 11246, the University is required by law to have affirmative action compliance programs. The University is also subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* ("Title VII") and, as such, has to provide equal employment opportunity. Thus, the fact that the University and Respondents are committed to equal employment opportunity and affirmative action programs is not, as Petitioner suggests, indicia of reverse discrimination. The record in this case shows that the actions Petitioner adduces as indicia of reverse discrimination are nothing but actions mandated by the law of the land. Moreover, simple logic dictates that affirmative efforts to reach minorities as a public policy does not necessarily constitute evidence of bias in a particular case involving the individual academic qualifications of a person who belongs to the majority. And, most significantly, Petitioner has never shown a causal relationship between the University's equal employment opportunity and affirmative action obligations and the denial of his request for promotions and tenure. The trial Court specifically so found (R. 71: Memorandum of Opinion at 16).

Petitioner also attempted to use a black female, Hale-Benson, as an alleged comparable even though she was not similarly situated. Hale-Benson had joined the Department of Specialized Instructional Programs, College of Education, in the fall of 1984 as an *untenured* Associate Professor and Coordinator of Early Childhood Programs. She had received her Ph.D. in Early Childhood Education from the Georgia State University

in 1974. From 1974 until 1979 she was an Assistant Professor in Early Childhood Education at Clark College in Atlanta. In 1979, she was promoted by Clark College to Associate Professor. While at Clark College, Hale-Benson also served as Research Associate in the Department of Psychology at Yale University (1979-1981) and as a Lecturer in the Afro-American Studies Program, also at Yale University.

In 1981, Hale-Benson became an Associate Professor of Early Childhood Education at Jackson State University in Mississippi. While at Jackson State, she was also a Research Affiliate, Psychology Department, at Yale University (1981-1983). Prior to her employment with the University, Hale-Benson had authored a nationally recognized book entitled "Black Children: Their roots, culture and learning styles" (1982) and had published two articles in refereed journals. She had also published a variety of articles in non-refereed journals.

Since Hale-Benson was hired by the University as an untenured Associate Professor and had more than one year of full-time college teaching experience, she had three years in which to obtain tenure under the University's policies. She submitted her request for tenure in the Fall of 1986 and her request was denied because of a concern about Hale-Benson's teaching, leadership in the Early Childhood Program for which she was coordinator and service in the Department, College and University. *Hale-Benson's publication record was not an issue.*

After Hale-Benson was denied tenure, her attorney made public charges of racism against the University and there was considerable publicity in the local newspapers pertaining to Hale-Benson, whose research and publication record in her area of expertise is nationally recognized. The record shows that the

contacts between Hale-Benson's attorneys and the University were exclusively limited to correspondence in late 1986 and early 1987 as to Hale-Benson's internal appeal rights in connection with her first request for tenure.

Hale-Benson applied for tenure again in the Fall of 1987. This time, the College of Education PAC and the Chair of her Department recommended against tenure but the recently appointed new Dean of the College of Education recommended that tenure be granted. Because the recommendations were conflicting, the Provost was obligated to refer the matter to the UPC and the UPC, by a vote of 6 to 1 and one absentee, recommended that tenure be granted. The Provost agreed with the UPC and the President then recommended the award of tenure to the Board of Trustees and tenure was granted, effective September 1, 1988.

Because the College of Education PAC had not supported Hale-Benson's request for tenure, the President was obligated by University policy to send a memorandum to the faculty of the College of Education describing his reasons for the recommendation in favor of Hale-Benson. In his memorandum, he explained that Hale-Benson's proven scholarship was reviewed *prior* to the decision to hire her as an Associate Professor and subsequent to her appointment at the University she had published a revised edition of her book which had been reviewed in major journals and was hotly debated in the academic community. The concerns about her teaching, program development and service expressed by all evaluators in 1986 and by some evaluators in 1987 were taken into account by those who supported her in 1987, but the Dean, the Provost and the UPC were satisfied that substantial improvement had taken place in her teaching and she was a fully competent teacher. The

President specifically found that he had "no basis on the evidence presented to challenge her teaching competence". The President also noted that her department had recently accepted her draft master's proposal for the Early Childhood Program, the absence of which had been a critical factor in the denial of tenure the prior year. In addition, Hale-Benson's funded research program, which involved the actual operation of a pre-school, was an asset to the department and community. The grants she had obtained had brought about half million dollars in funds. In summary, the reasons for the denial of tenure in 1986 no longer held true in 1987.

Petitioner has never offered a rational explanation as to how the fact that Hale-Benson had been represented by counsel in connection with the denial of her first request for tenure affected Petitoner's request for promotion and tenure. Nor has he offered a rational explanation as to how the accusations of racism at the University reported in the local newspapers affected the consideration of Petitioner's request for promotion and tenure. Similarly, Petitioner has never offered a rational explanation for the relationship between the denial of a promotion to a professor in the College of Engineering and the action taken by the City Council to vacate streets for a convocation center for the University. Moreover, the alleged conspiracy between the twenty-eight Respondents and the twenty-one member Council of the City of Cleveland is a conjecture of Petitioner that has never been proven and has never been rationally connected to the actual consideration of Petitioner's academic qualifications by his academic peers.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit Rule Requiring Proof Of Background Circumstances Supporting The Suspicion That The Defendant Is The Unusual Employer Who Discriminates Against The Majority Applies Exclusively To The *Prima Facie* Case Of The Individual Plaintiff Who Alleges Reverse Discrimination Without Direct Evidence Of Racial Discrimination. Since Both The Trial Court And The Sixth Circuit Gave Petitioner The Benefit Of Assuming That A *Prima Facie* Case Of Reverse Discrimination Had Been Established, The First Question Presented By Plaintiff Is Not At Issue In This Case. Moreover, The Sixth Circuit Rule Is Consistent With Prior Rulings Of This Court.

In his argument in support of the first question presented for review, Petitioner concedes that "the Sixth Circuit's explicit holding on petitioner's racial discrimination claim involves another issue" (Petition for Writ of Certiorari at 28). Given the fact that both the trial Court and the Sixth Circuit gave Petitioner the benefit of the doubt in connection with the *prima facie* stage of his case and the rule Petitioner now challenges addresses only the *prima facie* stage of a reverse discrimination case, the first question presented for review has no bearing on this case. Moreover, there is no inconsistency between the Sixth Circuit's *prima facie* case rule and the decisions of this Court.

In *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985), the Sixth Circuit Court of Appeals held that a reverse discrimination plaintiff bears the burden of demonstrating that he was intentionally discriminated against despite his majority status. Under *Murray*, the individual plaintiff who alleges reverse discrimination without direct evidence of racial discrimination must establish as part of his *prima facie* case that (a) "background

circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority" and (b) the employee was treated differently than other similarly situated employees of a minority race. *Id. Accord: Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983); *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986); *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *DeMarco v. Thomas*, 47 CCH E.P.D. ¶38,150 (D.D.C. 1988); *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986); and *Flaig v. Bendix Corp.*, 488 F. Supp. 336 (E.D. Mich. 1980), *aff'd without op.*, 701 F.2d 177 (6th Cir. 1982).

The rationale for this burden was explained by the Court in *Lanphear, supra*:

> "Title VII prohibits discrimination against white males upon the same standards that it prohibits discrimination against members of a racial minority. In other words, a plaintiff's ultimate burden of persuasion remains the same regardless of race: he must prove that the defendant intentionally discriminated against him. Yet this court has recognized that some adjustment is necessary in the *prima facie* case required of a white male.
>
> > The original McDonnell Douglas standard required the plaintiff to show 'that he belongs to a racial minority.' *Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the 'light of common experience' would lend a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.*

> Thus, to establish a prima facie case appellant needs to show more than that he was qualified for the CAO position but was rejected in favor of a black male from outside MSPB. He must also show that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.' In other words, to repeat the *Burdine* formulation, he must show that he 'was rejected under circumstances which [despite his majority status] give rise to an inference of unlawful discrimination.' " 703 F.2d at 1314-1315 (Emphasis added) (Footnotes omitted).

Once a *prima facie* case of reverse discrimination is established under *Murray*, the Sixth Circuit analysis follows the "articulation" and "pretext" analysis mandated by this Court for disparate treatment cases. That is, if the plaintiff establishes a *prima facie* case of reverse discrimination, the burden then shifts to the employer to articulate, not prove, a legitimate, nondiscriminatory reason for its actions. The ultimate burden of showing that the proffered reason is a pretext and of proving discrimination in reverse discrimination actions rests with the plaintiff. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 58 L. Ed. 2d 216, 99 S. Ct. 295 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); *U. S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983); and *Farber v. Massillon Board of Education*, 917 F.2d 1391, 1398 (6th Cir. 1990), *cert. den.*, 111 S. Ct. 2851 (1991).

In the instant case, the trial Court, following *Aikens, supra*, ruled that because Respondents had articulated a legitimate, nondiscriminatory reason it "need not

determine whether [Petitioner] established a *prima facie* case of tenure discrimination based on race . . ." (R. 71: Memorandum of Opinion at 15 fn. 16). The trial Court only referred to *Murray, supra*, as a general reference in a footnote (*Id.*). The Sixth Circuit referred to *Murray* in describing the analytical framework applicable to individual reverse discrimination cases, but it also gave Petitioner the benefit of the doubt and assumed that Petitioner had made a *prima facie* case (June 3, 1991 Order at 6-7). The rule challenged by Petitioner, thus, has no bearing on this case.

Contrary to Petitioner's contentions, there is absolutely no conflict between the *Murray* rule and this Court's decisions in *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976), and *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). The footnote in *McDonald* upon which Petitioner relies stands for the proposition that Title VII also prohibits discrimination against members of groups that historically have not been treated in a discriminatory manner. *McDonald* sanctions reverse discrimination actions under Title VII but does not establish the method and order of proof applicable to such actions. Similarly, the footnote in *Village of Arlington Heights* upon which Petitioner relies does not address the elements of a *prima facie* case in a reverse discrimination action when the plaintiff has no direct evidence of racial discrimination. Indeed, *Village of Arlington Heights*, which involved alleged discrimination against *minority* groups, recognizes that in cases of racial discrimination brought under the Equal Protection Clause the issue of determining whether race was a "motivating factor" in the challenged decision "demands a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available." *Id.* Among the particularly relevant evidentiary sources on that issue, this Court referred to the "historical background of the decision". *Id.* at 267. This principle is embodied in the *Murray, supra,* test adopted by the Sixth Circuit.

Moreover, in the precise footnote in *Village of Arlington Heights* upon which Petitioner relies, this Court specifically referred to the importance of "comparable decisions" in determining the existence *vel non* of racial determination. This is precisely what the courts below emphasized in finding that the reasons articulated by Respondents were legitimate, nondiscriminatory academic reasons for the denial of promotion to Associate Professor with tenure and that Petitioner had failed to show that such reasons were pretextual.

As the *Murray* issue has no bearing on the ultimate outcome of this case, the Petition for a Writ of Certiorari on this issue should be denied.

II. The Courts Below Correctly Held That In Order To Determine Whether The Denial Of A Request For Promotion With Tenure In The Mechanical Engineering Department In The College Of Engineering Was Racially Motivated It Was Improper To Use As Comparables A Candidate For Tenure In The Department Of Specialized Instructional Programs In The College Of Education And A Candidate For Hire As An Untenured Visiting Professor Of Civil Engineering In The College Of Engineering.

Contrary to Petitioner's claim, the rule on the applicable comparables in academic promotion and tenure cases is neither arbitrary nor does it carve out unwarranted exceptions for academic decisions. Rather, this rule embodies common sense, plain logic and due deference to academic judgments over elusive and intangible scholarly matters which are not easily quantified.

Because tenure and promotion decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally, federal courts have consistently deferred to the expertise of educational administrators in evaluating the factors which should be taken into account in academic promotions and tenure. *See e.g., Zahorik v. Cornell University,* 729 F.2d 85, 92 (2nd Cir. 1984); *Lieberman v. Gant,* 630 F.2d 60, 64 (2nd Cir. 1980); and *Keyes v. Lenoir Rhyne College,* 552 F.2d 579 (4th Cir.), *cert. denied.,* 434 U.S. 904 (1977). The Equal Protection Clause "does not require 'mathematical perfection' in distinctions between tenure candidates, and 'the mere assertion of such a constitutional claim does not convert the federal procedure into a plenary administrative review.' ". *Levi v. University of Texas,* 840 F.2d 277, 280 (5th Cir. 1988); *Faro v. New York University,* 502 F.2d

1229, 1232 (2nd Cir. 1974); and *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979). As recently stated by this Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 107 L. Ed. 2d 571, 588, 110 S. Ct. 577 (1990):

> "This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.' *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985)."

The unique factors in the tenure process were enumerated by the Court in *Zahorik, supra;* (1) tenure contracts entail commitments both as to length of time (lifetime) and collegiate relationships (department or college for life) which are unusual; (2) tenure decisions are most often non-competitive; (3) university tenure decisions are usually highly decentralized through peer review; (4) the evaluation is quite extensive as it takes into account departmental needs, the individual's skills in multiple areas, peer and outside reviewers, and university-wide needs; and (5) tenure decisions are a source of unusually great disagreement. 729 F.2d at 92-93. The reasons for the usual disagreement are multiple:

> "Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of tenure decisions than with employment decisions generally. As the present record amply demonstrates, arguments pro and con are framed in largely conclusory terms which lend themselves to exaggeration, particularly since the stauncher advocates on each side may anticipate and match an expected escalation of rhetoric by their opponents. Moreover, disagreements as to individuals may reflect long standing and heated disputes as to the merits of contending schools of thought or as to the

needs of a particular department. The dispersion of views occurs within departments themselves but is accentuated by the solicitation of opinion from students, faculty from other departments and faculty from other universities. Where a broad spectrum of views is sought and the candidate suggests certain persons as referrants, a file composed of irreconcilable evaluations is not unusual." 729 F.2d at 93.

Since the decisions taken with respect to the similarly situated candidates for promotion to Associate Professor with tenure in Petitioner's College overwhelmingly refute his claims of reverse race discrimination, Petitioner sought to compare himself with Hale-Benson, a black female in the Department of Specialized Instructional Programs in the College of Education who successfully sought tenure in academic year 1987-1988. The courts below ruled that, as a matter of law, this comparison was inappropriate. This conclusion is consistent with the well-developed principle that, in the university setting, the plaintiff must use comparables within his department or, possibly, his College. *See e.g., Zahorik, supra*, 729 F.2d at 93-94; *Smith v. University of North Carolina*, 18 FEP Cases 913 at 916-17, 922 (M.D.N.C. 1978), *aff'd*, 632 F.2d 316 (4th Cir. 1980); *Langland v. Vanderbilt University*, 589 F. Supp. 995, 1011 (M.D. Tenn. 1984), *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985); *U. S. v. University of Maryland*, 438 F. Supp. 742 at 756 (D.Md. 1977); and *Jackson v. Harvard University*, 721 F. Supp. 1397, 1401 (D. Mass. 1989), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. den.*, 112 L. Ed. 2d 104 (1990). *See also Johnson v. Michigan State University*, 547 F. Supp. 429 (W.D. Mich. 1982), *aff'd without op.*, 723 F.2d 909 (6th Cir. 1983).

This standard reflects common sense. As a matter of logic, a comparison between Mechanical Engineering and Specialized Instructional Programs in the College of Education is like comparing apples and oranges. *Zahorik, supra*, 729 F.2d at 93. Moreover, under the specific facts of this case, Petitioner's comparison with Hale-Benson is also flawed because she was hired as *an Associate Professor* and sought tenure only during the same year Petitioner applied for promotion. Scholarship as demonstrated in her publications, which was the issue in Petitioner's case, was not the issue in her request for tenure because her scholarship had been established at the time she was hired as an Associate Professor. The concerns about Hale-Benson involved her teaching. Thus the comparison sought by Petitioner not only addressed completely different academic disciplines but also necessitated a comparison of two different components of academic endeavors: teaching ability and demonstrated scholarship. The courts below, thus, correctly rejected Hale-Benson as a proper comparable.

Petitioner's comparison to Akinmusuru was similarly flawed even though he was hired in the same college where Petitioner taught. Akinmusuru was hired as a Visiting Associate Professor of Civil Engineering in academic year 1988-89 and he became an Associate Professor *without tenure* the following academic year, with a tenure date of January 15, *1992.* Akinmusuru had an impressive professional record at the time he was hired as a Visiting Associate Professor and his teaching experience was more extensive than Petitioner's. Moreover, Akinmusuru did not apply for a position at the University until *after* Petitioner's request for promotion had been denied. He had been interviewed for a vacancy in the Department of Civil Engineering which was initially offered to *another*

candidate, a *white* male who declined the position. By comparing a hire case to a promotion case, Petitioner again compared apples and oranges. Since, to this date, Akinmusuru remains untenured, there is no logic to the claim that Akinmusuru has obtained more than Petitioner sought. Thus, he was properly rejected as an appropriate comparable by the courts below.

Contrary to Petitioner's contentions, the instant case is not subject to the "suspect category" or "strict scrutiny" analysis set forth by this Court in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986). Throughout these proceedings, Petitioner has consistently refused to acknowledge that equal protection claims are subject to two different types of test, depending upon the nature of the state law at issue. Laws which, overtly or covertly, employ racial or ethnic classifications (facially discriminatory laws) are subject to the "strict scrutiny" test and can be justified only if they further a compelling governmental purpose and no less restrictive alternative is available. *See e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978); *Fullilove v. Klutznick*, 448 U.S. 448, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980); *Wygant, supra;* and *City of Richmond, supra.* This test clearly applies to racial classifications such as "quotas", "set asides" and numerical "preferences", which are not at issue in this lawsuit. *Bakke, supra; Fullilove, supra; Wygant, supra;* and *City of Richmond, supra.*

If, on the other hand, as it is the case herein, a law is neutral, *i.e.*, not race-based, the test is whether actions taken under the law are the result of invidious, purposeful discrimination on the basis of race. *Village of*

Arlington Heights, supra; and *Washington v. Davis,* 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976). In the public employment discrimination context, an employee who claims he has been discriminated against on the basis of race because a neutral law has not been applied without regard to race, *i.e.,* disparate treatment, is subject to the same standard and burden of proof as a Title VII disparate treatment plaintiff. *Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir. 1988); *Kitchen v. Chippewa Valley Schools,* 825 F.2d 1004, 1011 (6th Cir. 1987); *Daniels v. Board of Education,* 805 F.2d 203, 207 (6th Cir. 1986); and *Grano v. Dept. of Development,* 637 F.2d 1073, 1081-82 (6th Cir. 1980). *See also Scott v. University of Delaware,* 601 F.2d 76, 80-81 (3rd Cir.), *cert. den.,* 444 U.S. 931 (1979); and *Lee v. Conecuh County Board of Education,* 634 F.2d 959 (5th Cir. 1981), *reh. den.,* 640 F.2d 385. This is the precise test employed by the courts below.

Petitioner's failure to adduce any evidence to establish that the fact that he is a white male made the difference in the decision not to promote him cannot be overcome by claiming that this case is subject to the "strict scrutiny" test. Neither the facts nor the prior decisions of this Court support Petitioner's claims.

Respondents emphasize that the decision to deny Petitioner's request for promotion and tenure was based on his academic qualifications and not on an affirmative action program. As correctly found by the trial Court, Petitioner merely relied on the fact that the University is required to comply with Executive Order 11246 to contend that mere compliance with that Order was *per se* evidence of race discrimination against the white majority (R. 71: Memorandum of Opinion at 16). Petitioner offered no evidence that he was denied tenure

because of the University's compliance with Executive Order 11246 (*Id.*). To suggest that compliance with the law of the land is indicia of race discrimination against the majority is, simply put, preposterous. The suggestion proffered by Petitioner of some sinister, dark plot to unlawfully discriminate against white males is nowhere supported by the record. Such suggestion does not even amount to a scintilla of circumstantial evidence and is insufficient to create an issue for consideration by this Court.

III. The Court Below Correctly Held That A University Professor Cannot Maintain A Claim For The Alleged Deprivation Of His Equal Protection Rights In The Denial Of Promotion With Tenure When The Alleged Deprivation Is Not Premised On Racial, Ethnic Or Other Class Animus But On A Qualitative Consideration Of Academic Scholarship.

The third question presented for review by Petitioner is a typical "I-am-just-as-good-as-you-are" claim presented by a university professor who cannot accept the academic judgment of his academic peers. Since federal Courts have consistently and appropriately rejected the notion that a mere academic dispute should raise to the level of a constitutional claim and this Court has consistently deferred to academicians in purely academic matters, Petitioner's attempt to create a new constitutional claim has no merit.

The trial Court in this case found that Petitioner's claim that the Respondents did not apply the same standards in evaluating him and other individuals for reasons "other than race" was "not justiciable under the equal protection clause because it does not involve class-based discrimination" (R. 71: Memorandum of Opinion at 18). The trial Court correctly held that to hold otherwise would convert federal courts into a super-tenure review committee (R. 71: Memorandum of Opinion at 18). The Sixth Circuit Court agreed.

Such conclusions are consistent with several courts of appeals decisions which, in the specific area of academic tenure, have found challenges under the equal protection clause nonjusticiable unless the plaintiff alleges discrimination based on race, sex, or the exercise of a constitutional right. *See e.g., Wells v. Doland*, 711 F.2d 670, 675 (5th Cir. 1983) (mathematical perfection in

tenure decisions is not required when the academic distinctions burden neither a suspect class nor a fundamental interest); *Faro, supra,* 502 F.2d at 1232 ("The computer, highly developed though it be, is not yet qualified to digest the punch cards of an entire faculty and advise the waiting and expectant onlookers of its decision as to hiring and promotion"); and *Clark, supra,* (denial of a faculty promotion based on an evaluation of a faculty member's scholarly achievements is exactly the type of determination which is not justiciable in federal court in an action under civil rights statutes).

Petitioner's case precisely illustrates the reasons why Courts give considerable latitude to academic decisions in tenure cases. Petitioner has chosen to pursue "applied research" instead of the "fundamental (theoretical) research" traditionally accepted as "the academic research". While the Dean of the College and others at the departmental level were receptive to the acceptance of this type of research for academic tenure, the majority of those involved in the peer evaluation at the university-wide level were not. The Provost and the UPC had reservations about the nature and quality of Petitioner's research. They were also hesitant to credit confidential research not open for review by academics. The peer review system involves value judgments and academic considerations at various levels of the institution. While supported by some, Petitioner failed to convince a large number of tenured faculty that he should be admitted to tenured status. In a pluralistic university academic disagreement cannot be avoided. The Equal Protection Clause does not forbid it.

Before the trial Court, Petitioner argued that his claim for alleged discrimination for reasons "other than race" was based on this Court's decisions in *Yick Wo v.*

Hopkins, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886), and *Snowden v. Hughes*, 321 U.S. 1, 88 L. Ed. 2d 497, 64 S. Ct. 397 (1944). In *Yick Wo* the City and County of San Francisco had passed an ordinance prohibiting the operation of 310 laundries housed in wooden buildings, but allowing such laundries to resume operations if the operator secured a permit from the government. Most of these businesses were owned by Chinese individuals. Upon application to resume operation, all but one of about 80 white applicants obtained permits, but none of over the 200 Chinese applicants were successful. This Court ruled that although the ordinance was "fair on its face and impartial in appearance", the fact that it was "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights" constituted a denial of the constitutional right to equal protection of the laws. 118 U.S. at 373-374. This Court found that the administration of the ordinance was "directed so exclusively against a particular class of persons as to warrant and require the conclusion" that "no reason for it exists except hostility to the race and nationality to which the petitioners belong". *Id.* at 373, 374. The discrimination was, therefore, illegal. *Id.* at 374.

In *Snowden*, a candidate at a primary election for state office alleged that the State Primary Canvassing Board, acting in violation of state law, had failed to correctly certify him as one of the Republican nominees, depriving him of nomination and election as representative in the state assembly. The candidate disclaimed any contention that class or racial discrimination was involved. This Court held:

"Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination.* This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland v. American Sugar Co.*, 241 U.S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-4. But a discriminatory purpose *is not presumed, Tarrance v. Florida*, 188 U.S. 519, 520; *there must be a showing of 'clear and intentional discrimination.' Gundling v. Chicago*, 177 U.S. 183, 186; see *Ah Sin v. Wittman*, 198 U.S. 500, 507-8; *Bailey v. Alabama*, 219 U.S. 219, 231." 321 U.S. at 8 (Emphasis added).

In *Snowden*, this Court gave race and unequal taxation as examples of invidious and purposeful proscribed discrimination. The Court warned that "a construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored". 321 U.S. at 11-12.

Following this precedent, in *Charles v. Baesler*, 910 F.2d 1349, 1356-1357 (6th Cir. 1990), a case involving a promotion in a fire department, the Sixth Circuit held that in order to establish a constitutional violation under *Yick Wo, supra*, the plaintiff must show that the government "administered the contractual promotion system with a discriminatory intent or purpose". A mere showing that government officials incorrectly applied state/municipal law is not enough. Invidious discriminatory intention must be proven. *Id.* at 1357. As stated by the Sixth Circuit:

> "In short, Charles' equal protection claim boils down to the assertion that 'he was treated one way and everyone else another,' which 'has never been thought to raise an equal protection claim.' *Wagner v. Higgins*, 754 F.2d 186, 194 (6th Cir. 1985) (Contie, J., concurring). Charles may be correct in arguing that the government and its officials in fact singled him out due to their sloppy administration of the contractual promotion system and their misapplication of state and local law. Such negligence is a far cry, however, from intentional invidious discrimination. *Beck v. Washington*, 369 U.S. 541, 554-55, 82 S.Ct. 955, 962-63, 8 L.Ed.2d 98 (1962); *Snowden v. Hughes*, 321 U.S. 1, 7-9, 64 S.Ct. 397, 400-01, 88 L.Ed. 497 (1944)." *Id.* at 1357.

Since the record below is silent as to "the other reason" why he was "invidiously discriminated" against, the courts below properly rejected Petitioner's claims.

In pursuing his non-class discrimination claims, Petitioner did not explain why other faculty were allegedly "favored" by the Respondents, but merely suggested a mathematical tabulation of their academic credentials. Such tabulation is completely inappropriate and is the type of determination which courts have consistently declined to make. *Clark, supra*, 607 F.2d at

639 fn. 10. *See also, Bishop v. Wood,* 426 U.S. 341, 349-350, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); and *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 225-226, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985) (federal courts not suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions").

As stated at the outset, this case does not involve novel legal theories nor a complex factual background. This case concerns a faculty promotion decision upon which reasonable people could and did disagree. Disagreement does not constitute, in and of itself, evidence of unlawful discrimination. By failing to come forward with specific probative evidence of invidious discrimination by each of the twenty-eight Respondents, Petitioner failed to establish that there was a genuine issue of a material fact precluding summary judgment in favor of Respondents on this issue. The Court of Appeals properly rejected his "I-am-better-than-you are claim".

Clearly, the third question presented for review by Petitioner does not present a significant issue for review by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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